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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1248

GTE SYLVANIA, INCORPORATED, *ET AL.*,
*Petitioners,*

v.

CONSUMERS UNION OF THE UNITED STATES, INC., *ET AL.*,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR THE RESPONDENTS CONSUMERS UNION OF THE UNITED STATES, INC. AND PUBLIC CITIZEN'S HEALTH RESEARCH GROUP IN OPPOSITION

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Respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group agree with the federal respondents, the Consumer Product Safety Commission and its members ("CPSC"), that the petition for a writ of certiorari should be denied. However, since our views of the merits of the question presented are very different from those of the CPSC, we separately oppose review.

## Opinions Below

The opinion of the Court of Appeals (Pet. App. A1-A24) is reported at 590 F.2d 1209. The original opinion of the Court of Appeals (Pet. App. A44-A59), which this Court vacated (*see* 434 U.S. 1030), is reported at 561 F.2d 349. The opinion of the District Court (Pet. App. A32-A42) is reported at 400 F. Supp. 848.

## Jurisdiction

The judgment of the Court of Appeals was entered on December 22, 1978. The petition for a writ of certiorari was filed on February 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Question Presented

Did the Court of Appeals correctly hold that the right to bring an action under the Freedom of Information Act in a statutorily prescribed forum is not lost simply because the submitters of the requested information filed a few days earlier in other district, without naming or attempting to join the requesting parties in those actions?

## Statement of the Case

Two events in the spring of 1974 gave rise to this action: the CPSC requested that manufacturers of television sets submit to it data on accidents involving their products, and the respondents Consumers Union of the United States, Inc. and Public Citizen's Health Research Group (the "requesters") asked for that data under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* ("FOIA"). Because the manufacturers requested confidential treatment for their submissions, the CPSC did not immediately release them. (Pet. App. A47). While the requesters had the right at that point to bring suit under the FOIA because the CPSC had failed to make the data promptly available, they chose not to sue, but to allow the administrative process to be completed. Ironically, if they had exercised their right to sue immediately, the procedural issue in this case would never have arisen, a fact not likely to be lost on future requesters if the position of the manufactuers and the government prevails.



After considerable delay, the CPSC announced on March 28, 1975, that it intended to release the data on May 1, 1975 – except certain portions relating to individuals which the requesters had previously agreed not to seek – unless a court ordered the information withheld (Pet. App. A48). At this point, the requesters had no reason to sue since the CPSC had promised to release the data and since they did not know which, if any, manufacturers would seek to enjoin the release. In fact, twelve of the fifteen manufacturers did bring suit in four different Districts, and all of them obtained temporary restraining orders before May 1st, generally with the consent of the CPSC (Pet. App. A48-49). The CPSC neither moved to join the requesters, nor to transfer the cases to a forum, such as the District of Columbia, where the requesters could readily be added as parties. The CPSC instead obtained the transfer of four of the cases, which had been brought in the Southern and Western Districts of New York and the Eastern District of Pennsylvania, to the District of Delaware, where the remaining cases had been filed (Pet. App. A49). That forum is the District of incorporation of all twelve manufacturers, but it is not the principal place of business of any of them.

On May 5, 1975, the requesters filed their FOIA case in the District Court for the District of Columbia (Pet. App.

A51). Unlike the other actions, this one named not only the CPSC, but the truly adverse parties – the 12 manufacturers – as additional defendants pursuant to Rule 19 of the Federal Rules of Civil Procedure. But even this action failed to prompt the CPSC to alter its position in Delaware; instead, the Commission agreed to extend the temporary restraining orders beyond the 20-day maximum of Rule 65(a), until the preliminary injunction hearing could be heard (July 25th) and eventually decided. At the same time, all defendants in the District of Columbia, private and public, moved to dismiss that action, claiming that no case or controversy within Article III of the Constitution existed, because the CPSC wanted to, but would not, disclose the accident data. In the alternative, the CPSC and the manufacturers sought a stay of all proceedings in the District of Columbia pending a decision in Delaware, even though the requesters were not parties to the Delaware actions (Pet. App. A51). The sequence of these events is important because the petitioners and the CPSC have vigorously urged both in this case and in Delaware that the Delaware cases should go forward because they are comparatively further advanced, a situation that exists solely due to their unrelenting efforts to prevent the District of Columbia case from proceeding to the merits.

On September 22, 1975, the District Court in the District of Columbia agreed with the defendants' Article III claim (Pet. App. A32-A42). The Court concluded that because the CPSC found that the data had to be released, there was no case or controversy between it and the requesters, even though the CPSC refused to make the documents available because of the outstanding temporary restraining orders. As to the manufacturers, the District Court concluded that there was no independent cause of action under the FOIA against a private party, and that there was no subject matter jurisdiction in an action against the manufacturers in



any event. Exactly one month later, the District Court in Delaware issued its opinion, preliminarily enjoining the release of the data by the CPSC pending the outcome of the case on the merits (Pet. App. A71-A107).

The requesters then appealed the dismissal of their case to the D.C. Circuit Court of Appeals. Twenty-two months after the District Court decision, the Court of Appeals, in an opinion by Judge Wright, joined by Chief Judge Bazelon and Judge Robinson, reversed and directed the District Court to proceed to hear the merits (Pet. App. A44-A59). The Court held that there is an Article III case or controversy with respect to whether the preliminary injunction in Delaware prevented the District of Columbia Court from adjudicating the requesters' claim. In addition, the Court noted that since the preliminary injunction had been entered in Delaware in October, 1975, no further action had taken place, and that it thus appeared that the case had terminated.

Immediately thereafter, a conference was convened in Delaware before the District Court, and preparations were made to proceed with a hearing on a permanent injunction. Petitions for rehearing were then filed in the D.C. Circuit which pointed out the recent developments in Delaware (Pet. App. A61). At this late date, the CPSC finally filed a motion under 28 U.S.C. § 1404(a) in Delaware to transfer those cases to the District of Columbia. The CPSC did not, however, suggest that the requesters ought to be joined as parties under Rule 19, or that some effort should be made to bring all parties together in one consolidated proceeding. Not surprisingly, since the case had been pending in Delaware for more than two years, the District Court denied the transfer motion (Pet. App. A109-A117).

The D.C. Circuit denied rehearing. In a supplementary opinion, the Court noted the recent activity in Delaware, but concluded that nothing that had transpired there was relevant to this independent FOIA action, since it was only in the District of Columbia that all interested parties had been joined (Pet. App. A60-A63). The manufacturers then sought review in this Court, but without the support of the CPSC, which for the first time agreed that its earlier position regarding the absence of a case or controversy was in error (Pet. App. A10-A11 n. 33). Meanwhile, the District Court in Delaware heard the case on the merits, and on December 8, 1977, issued a permanent injunction (Pet. App. A118-A141). This fact, according to the CPSC, was a significant change in circumstances which it assumed would cause the District of Columbia courts to reconsider the question of proceeding to the merits, and it so advised this Court in opposing *certiorari*. On January 16, 1978, this Court granted *certiorari* and summarily vacated the decision "for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware" (Pet. App. A64).

Although both the manufacturers and the requesters promptly asked the Court of Appeals to establish a briefing schedule, nothing occurred until September 20, 1978, when the Court ordered the submission of supplementary memoranda within 20 days (Pet. App. A65-A70). After a brief extension, memoranda were submitted, and on December 22, 1978, in a thorough opinion by Judge Spottswood Robinson, the D.C. Circuit concluded that the entry of a permanent injunction in Delaware had no effect on the right of the requesters to bring this FOIA action (Pet. App. A1-A24). Judge Robinson carefully considered the numerous objections raised by the defendants, in particular their principal argument that because the manufacturers had



filed first, they had an unalterable right to choose the forum. Thus, according to petitioners and the CPSC, if the requesters wanted to participate in litigation on these issues, they had to intervene in Delaware. On this point, the Court concluded that in light of the great concern that Congress has shown in the FOIA for the rights of requesting parties, including special rights in forum selection, and the absence of any specific cause of action, let alone any venue preference, for submitters of information such as the manufacturers, the requesters were well within their rights in bringing this action in the District of Columbia (Pet. App. A20-A24).

In the meantime, following the decision in Delaware in December, 1977, the CPSC appealed to the Third Circuit. Since neither the parties nor the District Court had sought to join the requesters under Rule 19, they decided to file a brief *amicus curiae*, asking the Court of Appeals to reverse the Delaware District Court's failure to comply with that Rule (Pet. App. A142-144). Once again, the manufacturers and the CPSC were united in their opposition, first to the filing of any brief, then on their views on the merits of the Rule 19 issue. The Third Circuit, however, allowed the requesters to brief the issues as *amicus* and to participate in oral argument on January 12, 1979. As of this date, no decision has been rendered either on the Rule 19 issue or on the portion of the merits of the case which had formed the basis of the District Court's opinion.

Once again the manufacturers have sought review in this Court of the decisions of the D.C. Circuit, and once again the CPSC has asked this Court not to grant the petition. The CPSC nonetheless maintains that the decisions below are in error, but simply not in need of this Court's attention at this time.

**Reasons for Denying the Writ**

No one has suggested that any prior case in this or any other Court involves procedural issues substantially the same as those in this case, let alone that they have been resolved in a manner in conflict with the decisions of the D.C. Circuit. The only arguable conflict that might arise – in the related case in the Third Circuit – is no more than a possibility. That Court may agree with the requesters on the Rule 19 issue, or it may reverse on the merits without reaching the Rule 19 question, either with or without directions to the District Court to consider Rule 19 in the first instance.* Even if the Third Circuit does not agree with requesters that the case should be reversed for failure to comply with Rule 19, the result would not necessarily be in conflict with the outcome in the D.C. Circuit. That decision might be based on timeliness grounds, or some arguable waiver theory, both of which have been urged by the manufacturers and the CPSC. In any event, if the Third Circuit finds Rule 19 to be inapplicable and thus reaches a decision on the merits, there still would be no conflict since the D.C. Circuit has expressed no view on the merits of the requesters' claim. Such a ruling would only mean that the two actions would proceed independently. As the Court of Appeals stated, however, if that situation should occur, the manufacturers and the CPSC should not be heard to complain since they made no effort to consolidate the proceedings in a forum where all parties could readily be joined. (Pet. App. A21).

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*Since the District Court in Delaware reached only one of the numerous claims of the manufacturers, a reversal on the merits would by no means end the controversy there. The remaining issues would then have to be decided under this Court's recent decision in *Chrysler Corp. v. Brown*, No. 77-922, 44 U.S.L.W. 4434 (April 17, 1979).



While the issue resolved by the D.C. Circuit is an important one, no reason exists for this Court to review it since the result reached is plainly correct. The Court below has concluded, in three separate opinions, that FOIA requesters are not to be denied either the right to sue established by the FOIA, or their statutory right to a wide choice of venue, 5 U.S.C. § 552(a)(4)(B), simply because reverse FOIA plaintiffs, such as petitioners, have won a race to the courthouse which began only after a federal agency concluded that no basis existed for declining disclosure of the requested records. Any other outcome would turn the Act on its head by allowing submitters to control the forum of litigation in every case in which the real contest was between submitters and requesters over the disclosure of documents. For surely, if there is no case or controversy here, after twelve submitters have filed suit, none would have existed after a decision to release had been made but before any reverse FOIA action was brought, the only other instance in which the requesters could win a "race" to the courthouse. The inevitable result would be to encourage requesters to sue as soon as the agency's time for response under the Act had expired, thus short-circuiting the administrative process and causing cases to be brought prematurely and often unnecessarily into the federal courts. And the sole purpose that requesters would have in filing such anticipatory litigation would be to prevent the loss of their statutory choice of forum.

The D.C. Circuit correctly perceived the procedural problems facing requesting parties, and it fashioned the appropriate solution. In doing so, it correctly balanced the legitimate interests of all parties and properly considered the concern of the courts in avoiding multiple litigation over the same issue. Accordingly, no useful purpose would be served by this Court in reconsidering the opinions of the D.C. Circuit on this question.

## Conclusion

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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